INDEX

CITATIONS

Cases:

BLURRED COPY

Cases—Continued

Statute:

Miscellaneous:

BLEED THROUGH– POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 230

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. A. 78-90) is reported at 196 F. 2d 960. The findings of fact, conclusions of law, and order of the Board (B. A. 22-75), are reported at 93 NLRB 1523.[1]

[1] For purposes of this Memorandum, the printed record before this Court consists of two separately paginated volumes: the Appendix to petitioner's brief in the court below, herein designated "R.A." (the symbol employed by petitioner) and the Appendix to the Board's brief in the court below, designated "B.A." The proceedings in the court below are bound with and paginated continuously from the end of the Appendix to petitioner's brief. Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

BLURRED COPY

JURISDICTION

The decree of the Court of Appeals (R. A. 90-93) was entered on May 22, 1952. The petition for a writ of certiorari was filed on July 28, 1952. The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Section 8 (b) (2) of the amended Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a) (3)." The first question presented is whether, where a union is charged with violating Section 8 (b) (2), the Board may proceed against the union alone without joining the employer, against whom no charge was filed.

2. Whether a union's discriminatory refusal to grant an employee clearance for employment constitutes expression of "views, argument, or opinion" protected by Section 8 (c) of the Act.

3. Whether, when an employer discriminates against a union member by denying him employment because of the employee's failure or refusal to perform an obligation of union membership, a violation of Section 8 (a) (3) is established without independent proof that the discrimination "encouraged" (or "discouraged") the employee immediately affected, or any other employee, to acquire or retain "membership" in the union.

4. Whether the terms of the union-security agreement, which petitioner invoked to justify the

BLEED THROUGH– POOR COPY

discriminatory denial of employment to an employee, required the employer to hire only employees initially selected by the Union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the Petition (Pet., pp. 10-15).

STATEMENT

A. The Board's Findings of Fact and Conclusions of Law

This proceeding is founded upon a charge filed by Willard Christian Fowler against petitioner, the Radio Officers' Union (AFL) (hereinafter designated the Union), alleging that it caused an employer, the Bull Steamship Company (herein called the Company), discriminatorily to refuse him employment.[2] Following the usual proceedings under Section 10 (c) of the Act, the Board issued its findings of fact, conclusions of law, and order on April 18, 1951 (B. A. 22-75). The pertinent findings of fact and conclusions of law made by the Board may be summarized as follows:

1. *As to the hiring contract between the parties*

The transactions giving rise to this case took place in the early months of 1948. At that time, the Union held a collective bargaining contract with a number of steamship concerns, one of which was the Bull Steamship Company (B. A. 44-45; 215-

[2] No charge was filed against the Company (B. A. 78).

BLURRED COPY

216). The contract, which covered the employment of radio officers on ships of the contracting companies, by its terms required the employers "to select * * * members of the Union in good standing, when available," for employment as radio officers; and it provided (*ibid.*)

> when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.

However, the contract also expressly reserved to the Company "the right of free selection of all its Radio Officers," and it did not require the Company to leave the selection of its radio officers to the Union (*ibid.*) [3]

Though free under the contract to hire any union operator they chose, the companies usually left their choice of radio officers in the hands of the Union. On occasion, however, the companies exercised their contractual right of "free selection" and made their own choice of radio personnel (B. A. 46; 167-168, 81, 204, 82, 90, 138-139). When vacancies

[3] The validity of the union-security provisions of the contract, which was negotiated prior to the effective date of the 1947 amendments to the Act, was preserved by Section 102 (R. A. 14-15).

BLEED THROUGH– POOR COPY

occurred, the employers would either call upon the Union to furnish an unemployed member from its shipping list, or would name the man they wished to hire. The Union, depending upon the type of request, would either dispatch an unemployed member of its own selection for the post or would refer the member specified by the employer, furnishing him with a written "clearance" (B. A. 45-46; 150, 151-153, 163-165, 167-168, 174-176, 177-178, 193-194, R. A. 35, 64, 77). It was the Union's policy and unwritten rule that members desiring employment should apply for work at the union hall and there await their turn to be dispatched to a job. (B. A. 45-46, 59; 150, 151-153, 127, 163-165, 167, 174-175, 178, 193-194). The Union frowned upon the practice of the companies' exercising their contractual right to name their choice of radio officers. According to the Union's general secretary-treasurer, Fred M. Howe, "some of the members don't think too much of that system" (B. A. 57-58; 167-168). Over the years, the Union came to consider it an offense for a member to solicit or accept an offer of employment directly from a company; this offense was deemed particularly serious when acceptance of such an offer would result in the "bumping" of a fellow member (B. A. 48-49, 59-60; 167-168, 116-117, 89, 154-155, 85, 205, 158-159, 210, 160-161).

In the proceedings below, the Union contended that the aforesaid agreement, as implemented by the practice of the parties, obligated the employers and their prospective employees to conform to hiring hall procedure and that the Union, accordingly,

BLURRED COPY

could rightfully refuse to "clear" an employee for a position, even though he was a union member "in good standing," if he had dealt directly with the employer about the prospective job, without prior recourse to the Union's hiring hall. The Board rejected this contention and found that the contract clearly reserved to an employer the right to hire radio officers of its own choosing, provided only that any prospective employee be a "member" of the Union "in good standing" (B. A. 23-25, 58, 61-63).[4]

2. *As to the discrimination against Fowler, the charging party*

Fowler, an old employee of the Company (B. A. 46; 80), was a long-time member of the Union and at all times herein material was "in good standing" (B. A. 46; 172, 86-87, 93-95, 206-209). On February 24, 1948, at his home in Miami, Florida, he received a telegram from Robert H. Frey, the Company's radio supervisor, summoning him to New York City for immediate assignment to a job on the Company's ship *S. S. Frances* (B. A. 47; 81, 204, 132, 133). Fowler at once notified the Company that he would accept the job.

That same day in New York, supervisor Frey notified the incumbent radio officer on the *Frances*, a union member named Kozel, that he was to be replaced by "a man with senior service in the company" (B. A. 46; 143). On the 25th, Fowler came to New York to take up his new assignment. He

[4] Member Murdock dissented on this point (B. A. 31-34).

BLEED THROUGH– POOR COPY

went to the Union headquarters but was unable to see Secretary Howe, who was busy at the time (B. A. 47; 82-83, 115). From there, Fowler went to the *S. S. Frances* where he met Kozel, the radio officer on the preceding voyage (B. A. 46-57; 83, 87, 121, 133-134). Kozel asked Fowler if he had been cleared. Fowler replied in the negative but explained that he did not know there was a radio officer aboard, and suggested that Kozel straighten out the matter with the Union (B. A. 47; 83-84). Kozel reported Fowler's appearance on the ship to the Union that day (R. A. 53). On February 27, Howe, acting without authority and in disregard of the disciplinary procedures prescribed in the Union's by-laws (B. A. 26, 62; 157, 160-162, 210), wired Fowler that he had been suspended from membership in the Union for bumping another member (B. A. 47-48; 85, 205).[5]

On February 28, and again on March 1, Fowler spoke to Howe concerning the suspension telegram and expressly requested clearance for the *S. S. Frances* (B. A. 52; 88-90). Howe refused the request, asserting that Fowler had violated the Union's rules by failing to obtain "clearance" (*i.e.*, a referral from the dispatcher at the Union's hiring hall) before arranging for the position with Frey, and by "trying to steal jobs from other members" (B. A. 52-53; 89-92, 127-128). Howe declared that the Union would never again clear Fowler for a

[5] The trial examiner, the Board, and the court below agreed that the suspension was null and void and found that Fowler remained in good standing as a Union member throughout this period. Petitioner no longer challenges this finding.

BLURRED COPY

position with the Company, but suggested that Fowler might take other jobs which the Union had at its disposal (B. A. 52-53; 90, 92). Fowler elected, instead, to return to his home in Florida for the time being (B. A. 92). Unable to obtain a "clearance" for Fowler, the Company gave the job on the *Frances* to another man who was dispatched by the Union (B. A. 52-53; 137).

On April 22, Fowler returned to New York City and, again, first advised the Company that he was available for work before he reported to the Union (B. A. 54; 95-96, 138). On April 25, Fowler went to the Union hall and told Howe, in effect, that he was looking for a job. Howe told him, "We have plenty of jobs available for you but it still stands as far as the Bull line is concerned, you will be given no clearance for any Bull Line ship" (B. A. 54-55; 96-97, 123-124). He added that supervisor Frey had been "making a company stiff" out of Fowler and that he, Howe, intended "to break it up here and now" (B. A. 54-55; 97), overruling Fowler's protest that nothing in the Union's constitution and by-laws precluded him from working for the Company or any other employer he might prefer (B. A. 54; 124). Two days later, a job opened on the Company's ship *S.S. Evelyn*. Frey asked Howe to clear Fowler for the job, but Howe, adhering to his previously announced position, refused to issue the requested clearance. Frey thereupon hired another man dispatched by the Union (B. A. 56-57; 139-140, 141, 148, 202).

On May 1, Fowler had a final interview with Howe in which the Union official censured him for

BLEED THROUGH– POOR COPY

renewing his contacts with Frey and again accused him of trying to "steal jobs" from fellow members of the Union. When Fowler retorted that Howe appeared to be trying to "railroad" him out of the Union, Howe said, "as far as I am concerned you are through," and suggested that Fowler seek membership in the rival American Communications Association if he desired a job (B. A. 56-57; 102-103, 110, 129, 131).

On the foregoing facts, the Board found (B. A. 23-28, 65-68) that the Union, by refusing to "clear" Fowler in both February and April, 1948, caused the Company to discriminate against him by denying him employment. The Board found that this discrimination, based on Fowler's alleged disloyalty and infraction of the Union's rules, tended to "encourage * * * membership in [a] labor organization" (Section 8 (a) (3) of the Act), even though Fowler himself was already a member of the Union, in the sense that it was "aimed at compelling obedience to union rules" (B. A. 28). Therefore, the Board concluded, the discrimination against Fowler was proscribed by Section 8 (a) (3) of the Act, and the Union, by causing the Company so to discriminate violated Section 8 (b) (2). The Board concluded further (B. A. 59-65, 28), that Fowler had the right under Section 7 of the Act to refrain from observance of the Union's rules because such observance was a form of concerted activity, and hence, as the Union restrained and coerced Fowler (by causing him to lose employment) in his exercise of this statutory right, it violated Section 8(b) (1) (A) of the Act as well as Section

BLURRED COPY

8 (b) (2).[6] The Board rejected (B. A. 23) the Union's contention that the collective bargaining contract immunized its conduct, because the contract, as explained above, only made union membership "in good standing"—a condition which was met in Fowler's case—a prerequisite to the employment of radio officers, and did not, in addition, require conformity with the Union's hiring-hall rules and procedures.

B. The Decision of the Court Below

The court below affirmed the Board's findings and conclusions and enforced the Board's order in full. In its opinion the court expressly agreed with the Board's conclusion that the collective bargaining contract afforded the Union no defense (R. A. 80-83). The court also agreed that the Union-caused discrimination against Fowler, even though Fowler was a member of the Union at the time, had the effect of encouraging "membership" in the Union. In this connection, the court observed that the discrimination "displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members" (R. A. 85).[7]

---

[6] Petitioner's only challenge to this conclusion, embodied in Question 2 (Pet., pp. 7, 21), is that its refusal to clear Fowler for employment constituted, not restraint or coercion, but a legitimate expression of opinion. This contention is discussed *infra*, pp. 18-19.

[7] Although Judge Clark dissented (R. A. 86) with respect to the construction of the contract, being of the view that the contract did provide for a hiring hall, he did not disagree with the conclusion of the Board and the court below on the basic question presented here, whether, absent such a contract, the Union's conduct violated Section 8 (b) (2).

BLEED THROUGH– POOR COPY

DISCUSSION

1. Section 8 (a) (3) of the Act, which also defines the union unfair labor practice proscribed in Section 8 (b) (2), makes it unlawful for an employer

> by discrimination in regard to * * * employment * * * to encourage or discourage membership in any labor organization * * *

Petitioner contends, in effect, that the Board and the court below misapplied the phrase "encourage * * * membership" in this case (Pet., pp. 7, 21-24).

The court below, in agreement with the Board, considers that the term "membership [in any labor organization]," in the context of Section 8 (a) (3), embraces the privileges and duties incidental to union membership, including the faithful performance of obligations imposed by a union upon its members as such and not merely the formal act of joining or remaining in a union. Accordingly, the Board and the court below held that "membership" in the Union herein was palpably encouraged by the discrimination against Fowler, since the discrimination was based on Fowler's alleged breach of obligations flowing from his status as a Union member and was "aimed," in the Board's words, "at compelling obedience to union rules" (B.A. 28), which is certainly an important aspect of membership. Under this view, it is immaterial that Fowler was an old Union member and therefore, obviously, not himself "encouraged" to *join* the Union, for mere enrollment on a union's roster is not the definitive test of "membership"

BLURRED COPY

standing. The Union's conduct would "encourage" other persons to comply with Union requirements for members. A similar non-restrictive application of the key word "membership" was judicially approved in *National Labor Relations Board* v. *Walt Disney Productions,* 146 F. 2d 44, 49, certiorari denied, 324 U.S. 877, where the Ninth Circuit assimilated "membership in a labor union" to taking an "active part in union affairs" and held that to discourage one was to discourage the other.

However, in *National Labor Relations Board* v. *International Brotherhood of Teamsters, etc.,* 196 F. 2d 1, decided April 29, 1952, rehearing denied June 2, 1952, the Court of Appeals for the Eighth Circuit rejected the Board's concept of encouraging membership. In that case an employee was deprived of his seniority and consequently lost employment because he had broken a union by-law by failing to pay his union dues on time. There, as in this case, the Board held that the discrimination necessarily tended to encourage union membership in the statutory sense, even though the employee immediately affected was himself a long-time member of the union. The Court of Appeals reversed the Board, and ruled that no violation of Section 8 (a)(3) was established because the employee himself was already a union member, and the record did not permit an inference that any other employees' "adhesion to membership" (196 F. 2d at 4) in the union had been encouraged by the discrimination. Thus the Eighth Circuit apparently believes that mere "adhesion," or enrollment upon a union's register of members,

BLEED THROUGH– POOR COPY

is the limit of the term "membership in [a] labor organization" and that "membership" is not encouraged unless one or more employees are demonstrably influenced to join a union or permit their names to stay on its rolls. We agree with petitioner that this decision conflicts squarely with the decision below.[8]

The Second and the Eighth Circuits disagree, in these two cases, not only as to the meaning of "membership" in the statutory phrase "to encourage or discourage membership," but also as to the corollary question whether, given discrimination in employment *based on* union membership or activity (or want thereof), the Board may infer, without more, that the necessary effect of the discrimination was to "encourage or discourage" membership in the union. As petitioner correctly asserts (Pet., p. 22), the court below held that this proscribed effect is "inherent" in such a case, pointing out that job discrimination against a union member because he has violated the union's code of loyalty is a display of the union's power which is bound to impress

[8] Petitioner also claims (Pet., pp. 3, 23-24) that the decision below conflicts with decisions of the Seventh, Eighth and Ninth Circuits in *Western Cartridge Co.* v. *National Labor Relations Board*, 139 F. 2d 855 (C.A. 7); *National Labor Relations Board* v. *Winona Textile Mills*, 160 F. 2d 201 (C.A. 8); and *National Labor Relations Board* v. *Potlach Forests, Inc.*, 189 F. 2d 82 (C.A. 9). Those cases, however, are inapposite, for none of them involved the issue presented here. In the *Winona* and *Potlach* cases the crucial question was whether there was "discrimination" based on union membership or activity, within the meaning of Section 8 (a) (3), and Section 8 (3) of the Wagner Act. In the *Western Cartridge* case the Seventh Circuit held that discrimination based upon employees' engaging in a "wildcat" strike did not serve to discourage membership in the particular union which "had nothing to do with the strike" (139 F. 2d 855, 859, 860-861).

BLURRED COPY

non-members (R.A. 84-85). The Eighth Circuit, on the other hand, held in the *Teamsters* case that the efficacy of the discriminatory practice to "encourage or discourage" union membership must be independently proved by substantial evidence, even assuming—or, at least, not expressly denying—that the reason for the discrimination there was union membership or some aspect or quality of union membership.[9]

Thus the Second Circuit, endorsing the Board's own long-standing view,[10] holds that (1) discrimi-

---

[9] Although based in part on other grounds, the decisions of the Third and Eighth Circuits in *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C.A. 3) and *National Labor Relations Board* v. *Webb Construction Company*, 196 F. 2d 702 (C.A. 8), also adopt this position in principle, and to that extent they, too, are contrary to the decision below and to the Second Circuit's later decision in *National Labor Relations Board* v. *Gaynor News, Inc.*, 30 LRRM 2340 (C.A. 2, June 24, 1952). However, none of those three cases turned on the precise question presented here and in the *Teamsters* case, namely, whether discrimination against union members for violation of union rules necessarily results in encouragement of "membership" in the union. The question as to which the Second and Third Circuits disagreed in *Reliable* and *Gaynor* is whether the Board may infer that union membership is "encouraged" where the employer gives more favorable treatment to union members than to employees who are excluded from the union and unable to gain admission in the foreseeable future because its doors are closed against them. The *Webb Construction* case, *supra*, where the Eighth Circuit endorsed the views expressed in *Reliable*, also involved, essentially, the question of "encouraging" membership in a closed union, for there the discrimination was directed against an employee who, although he was a member of the union's subordinate apprentice local, was ineligible for admission to full-fledged membership in the union itself because he did not possess the qualifications of a journeyman.

[10] See *General Motors Corp.*, 59 NLRB 1143, 1145, enforced *per curiam*, 150 F. 2d 201 (C.A. 3). The Board there stated, rejecting a contention that certain discrimination in employ-

BLEED THROUGH– POOR COPY

nation in employment (2) *because* of "membership" in a labor organization are the "evidential facts" (*Republic Aviation Corporation* v. *National Labor Relations Board* and *National Labor Relations Board* v. *Le Tourneau Company of Georgia,* 324 U.S. 793, 800) to be established in a case arising under Section 8 (a) (3); the Eighth Circuit goes farther and requires "evidence as to the results which may flow from such facts" (*ibid.*).

Because of the conflict between the decision below and *Teamsters,* and the fundamental importance of the now unsettled questions here discussed, the Solicitor General in behalf of the Board intends to file a petition for a writ of certiorari to review the *Teamsters* decision. In that petition we shall state more fully our reasons for believing that the decision below is right and the *Teamsters* decision wrong. Accordingly we do not oppose the grant of the petition in this case as to the third question presented. However, for the reasons set forth below, we oppose grant of the petition as to the remaining questions.

2. Rejected as "insubstantial" by the court below (R.A. 85), petitioner's contention (Pet., p. 6), "that the failure of the Board to join the employer as a party to the proceeding was fatal to the proceeding," does not pose a question warranting re-

---

ment based on union activity was not calculated to discourage union membership, "Admittedly the transfer was made *because* the employees * * * had designated the Union as their representative; * * *. Under the circumstances, we find * * * in any event, * * * that the transfer was of such a character as to have a *natural tendency* to discourage union membership." (Emphasis supplied.)

BLURRED COPY

view. Section 8 (b) (2) of the Act provides that it shall be an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee *in violation of subsection* (a) (3) . . ." (Emphasis supplied.) In this case the complaining employee, Fowler, filed a charge against the Union alleging that it caused the Company to discriminate against him, but he did not file a charge against the Company alleging that it had engaged in unfair labor practices. Hence, under Section 10 (b) of the Act, the Company was not, and could not properly be made, a party to the proceedings.[11] Petitioner argues, nevertheless, that since a finding that the Company engaged "in violation[s] of subsection (a) (3)" could not be made without the Company's participation in the proceeding, the Board was foreclosed from finding that petitioner itself "caused" such an employer violation, in breach of Section 8 (b) (2).

Petitioner points to nothing in the statute and to no judicial authority which even suggests that the Board must charge an employer with violation of Section 8 (a) (3), proceed against him, find him guilty, and issue a remedial order against him, as a condition to finding a union guilty of violating Section 8 (b) (2) of the Act. Indeed, the language of the statute points to a contrary conclusion: the Board, with judicial approval, has held that the

[11] Section 10 (b) provides that "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect. . . ." See *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. 2d 38, 42-43 (C. A. 6).

BLEED THROUGH– POOR COPY

phrase "in violation of subsection [8] (a) (3)" appearing in Section 8 (b) (2), "was intended by Congress to be [only] descriptive of the kind of discharge it is unlawful for a union to cause or attempt to cause." *National Union of Marine Cooks and Stewards,* 92 NLRB 877, 878, (cited with approval in *National Labor Relations Board* v. *Newspaper & Mail Deliverers' Union,* 192 F. 2d 654, 656 (C. A. 2)); see also *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1013, 1015 (C. A. 7), certiorari denied, 342 U. S. 815. The soundness of the Board's conclusion is obvious from the fact that a mere "attempt" by a labor organization to cause an employer to violate subsection 8 (a) (3) is a violation of Section 8 (b) (2), even though the attempt failed and the employer did not in fact commit an unfair labor practice. Under the circumstances the court below properly held (R. A. 85), "A finding that the union has violated Section 8 (b) (2) can be made without joining the employer and finding a Section 8 (a) (3) violation." [12]

Petitioner's assertion that the Board abused its discretion, and departed from the policy enunciated in *H. M. Newman,* 85 NLRB 725, by failing to join the Company is also unfounded. As noted above, absent a charge against the Company the Board was

[12] This same principle was applied in a converse situation by the Ninth Circuit, which held that the Board was not precluded from finding an employer alone guilty of violating Section 8 (a) (3) where the union which caused the discrimination was not charged and hence not joined as a respondent. *Katz, d/b/a Lee's Department Store* v. *National Labor Relations Board,* 196 F. 2d 411 (C. A. 9).

BLURRED COPY

without power to join it as a party. For this reason the *Newman* case is wholly inapposite, for there both the union and the employer responsible for the discrimination against an employee were before the Board as the parties respondent. The only question of policy presented in that case was whether, in such circumstances, both parties respondent should be held jointly and severally liable to make the employee whole.[13]

3. Petitioner contends that its refusal to clear Fowler for jobs with the Company, although this concededly caused Fowler's loss of employment, was only an "expression of views, argument or opinion" protected by Section 8 (c) of the Act, and hence not an unfair labor practice. This contention was properly rejected by the court below on the authority of *International Brotherhood of Electri-*

---

[13] Respondent's companion contention (Pet., p. 19), that the back pay order is invalid without an order of reinstatement, is entirely without merit. It was established by a long line of authorities prior to the amendments to the Act, that a back pay and reinstatement order need not be joined in any particular case and that the Board was vested with the discretion to prescribe either or both remedies. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. 2d 202, 205 (C. A. 2), affirmed, 313 U. S. 177, 200; *Indianapolis Power and Light Co.* v. *National Labor Relations Board*, 122 F. 2d 757, 763, certiorari denied, 315 U. S. 804; *Reliance Manufacturing Company* v. *National Labor Relations Board*, 125 F. 2d 311, 321 (C. A. 7). The 1947 amendments to the Act, including those to Section 10 (c), in no way limit the power conferred upon the Board in the original Act, to issue remedial orders like those approved in the cases cited above. *Union Starch & Refining Company* v. *National Labor Relations Board*, 186 F. 2d 1008 (C. A. 7); and note particularly, *Progressive Mine Workers* v. *National Labor Relations Board*, 187 F. 2d 298 (C. A. 7), amended opinion March 20, 1951, 27 LRRM 2334, where the court amended its original opinion by deleting language which would have sustained the precise contention advanced here by respondent.

BLEED THROUGH– POOR COPY

cal Workers v. *National Labor Relations Board,* 181 F. 2d 34, 38, affirmed, 341 U. S. 694, 701-705, and is plainly without merit.

4. Turning as it does on facts peculiar to this case, the Board's determination that the parties had not contracted to establish a hiring hall arrangement does not present a question sufficiently important to warrant review by this Court. Cf. *National Labor Relations Board* v. *Nu-Car Carriers, Inc.,* 189 F. 2d 756 (C. A. 3), certiorari denied, 342 U.S. 919. In any event, the concurrent determination of the trial examiner, the Board and the court below that no obligatory hiring hall arrangement had been established is abundantly supported by the record (see, *supra,* pp. 3-6). As the Board and the court below noted (B. A. 25, R. A. 82), the words of the contract were unambiguous and plainly reserved to the Company the "right of free selection" of radio operators subject only to their being in good standing in the Union. Not a word in the contract suggests that the Company must hire radio personnel referred by the Union's dispatching office.[14] Nor was there anything in the practice of the parties in implementing the agreement which would warrant the assertion that the Company had yielded up its contractual right to free selection. The fact that the Company frequently hired its

[14] Compare the following clause from the contract involved in *National Labor Relations Board* v. *National Maritime Union,* 175 F. 2d 686 (C.A. 2), certiorari denied, 335 U. S. 954. "The Union agrees to furnish satisfactory men and the Company agrees that during the period that this agreement is in effect all replacements shall be hired through the office of the Union, as vacancies occur" (78 NLRB 971, 973).

BLURRED COPY

radio operators through the Union hall, as the court below noted (R. A. 82-83), "did not effect a surrender of the Company's rights under the contract," because "a party to a contract does not lose clearly reserved rights merely by noninsistence upon them in every instance." This is especially true here, where the companies did exercise their right of free selection, and the Union cleared for employment, albeit reluctantly, "many hundreds," of radio operators who were specifically chosen by the shipping companies and not by the Union's dispatching officer (B. A. 167-168).

Petitioner's contention that the Board erred in placing primary reliance on the terms of the contract rather than the practice of the parties likewise merits no consideration by this Court. In the first place, as the court below noted (R. A. 83), nothing in the record or proffered evidence would even tend to establish that the Company had agreed to waive its contractual right of free selection of radio operators. But even if there were some evidence which would tend to establish such a waiver, the Board could properly discount it because, under familiar contract law, where, as here, the terms of a contract are clear, the parties cannot prove an interpretation directly contrary to its plain meaning.[15] This is doubly true where the interpretation would legalize conduct otherwise banned by the statute. Con-

[15] Williston on Contracts, Rev. Ed., Sec. 623, pp. 1793-1794; *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. 2d 480, 482 (C. A. 5), certiorari denied, 313 U. S. 582; *In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296, 299 (C. A. 7).

BLEED THROUGH– POOR COPY

tracts providing for union security arrangements, such as the hiring hall practice which petitioner sought to prove as a defense in this case, are valid only by virtue of the union shop proviso to Section 8 (a) (3) [16] which permits a limited exception to the statutory ban on discrimination in employment based on union membership. A contract cannot come within this statutory exception unless its purpose is expressed in plain and unmistakable terms.[17] Manifestly, here, where the contract by its terms accorded the Company the right of free selection of radio operators, a right directly antithetical to the hiring hall arrangement, and where the countervailing evidence, at best, is equivocal in import, it would be in the teeth of this elementary principle to read the contract as obligating the Company to hire exclusively employees selected by the Union.[18]

---

[16] In this case, because of the provisions of Section 102, the closed shop proviso to Section 8 (3) of the Wagner Act is applicable (see n. 3 *supra*).

[17] *National Labor Relations Board* v. *Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2); see also *Phillips Co.* v. *Walling*, 324 U. S. 490, 493, 498; *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 962 (C. A. 2), certiorari denied, 319 U. S. 741.

[18] *National Labor Relations Board* v. *Scientific Nutrition Corp.*, 180 F. 2d 447, relied upon by petitioner (Pet., pp. 25-26), is distinguishable on the facts. There, because the Company did not expressly reserve, as was done here, the very right which the parties sought to negate by parole evidence, the Court was undoubtedly more inclined to read the practice of the parties into the contract. Moreover, there, unlike here, the record showed that the parties viewed the closed shop practice which was not literally covered by their written contract as nonetheless obligatory (180 F. 2d, at 449). Nothing in the record here or in the proffered evidence shows that the parties deemed the Company *bound* to leave to the Union the choice of personnel.

BLURRED COPY

CONCLUSION

For the reasons stated, we do not oppose the grant of the petition for a writ of certiorari limited to the question of the interpretation of Section 8 (a) (3) of the Act. However, we urge that the petition should be denied with respect to the other questions raised by petitioner.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel;
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Assistant General Counsel;
ELIZABETH W. WESTON,
LOUIS SCHWARTZ,
Attorneys,
National Labor Relations Board.

AUGUST, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 219723 249

BLEED THROUGH– POOR COPY